No. ~~12388~~

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUIS PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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STATUTES

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BRIEF OF APPELLEE

JURISDICTION

The appellant was indicted in the Northern Division of the Western District of Washington, for violating Section 174, Title 21, U.S.C.; entered a plea of not guilty; was tried before the Honorable John C. Bowen, sitting without a jury; convicted and

sentenced to serve ten months in custody. From this conviction the appellant appealed. The appellant is presently at liberty on bond.

The indictment is set out on page 2 of the Transcript of Record. The statutes authorizing review by this Court are set out on page 4 of appellant's brief.

STATEMENT OF THE CASE

The indictment charges the appellant with receiving and concealing opium and yen shee knowing the same to have been imported contrary to law. Prior to the trial the appellant moved to suppress the evidence claiming that the narcotics which the Government intended to use as exhibits were seized as the result of an unlawful search. This motion was heard upon affidavits submitted by both sides. Upon considering the evidence thus adduced, the trial Judge denied the motion to suppress. The trial Judge made the following finding in the order denying the motion to suppress:

> " * * * the Court finds from the evidence that the police officers who seized the narcotics from the home of the defendant Ruis Parker were acting upon an emergency and had no knowledge or suspicion of any violation of the Federal Narcotic Laws nor any reason for securing a search warrant until the narcotics were discovered in the defendant's possession during the course of

the police officers' investigation of an emergency; * * *" (T.R. 26, 27).

The evidence adduced at the trial and the evidence adduced by affidavits on behalf of the Government in resisting appellant's motion to suppress revealed the following facts:

Captain Morris was the Supervising Captain of the night shift and the Captain of the Felony Squad of the Seattle Police Department. His squad consisted of four other members, Officers Zuarri, Waitt, Musselman and Ivy. On the night of November 24, 1948, Captain Morris and his squad were preparing to depart from the police station to work on a case. At approximately 9:30 Captain Morris received a telephone call from an unknown party. The caller did not identify himself, but told Captain Morris that there was a man in Apartment B at 1219½ Yesler who was poisoned and in bad shape, and somebody had better get up there in a hurry. (T.R. 75). Since the address given over the telephone was in the general direction of the destination of Captain Morris' squad on the case they were about to work on, Captain Morris decided to stop at this address to determine what the trouble was. Captain Morris told the members of his squad to meet him at 12th and Yesler. Captain Morris proceeded to this address in his car,

and the other members of this squad proceeded to 12th and Yesler in two separate cars. When the squad assembled in front of a two-story apartment house located at 1219½ Yesler Way, Captain Morris directed two of his squad to remain on the street and took the other two men with him. The three officers then walked into the apartment building. The ground floor entrance door was closed but not locked. The officers saw no one in the hall, although the voice on the telephone had advised Captain Morris that he would meet the officers at the apartment. The officers climbed the stairs to the second floor where they found the door leading to Apartment B open approximately one foot. Captain Morris called out, "Is anyone home?" several times while pushing the door open and walking into the apartment. No response was heard from within the apartment. The three officers walked into the living room and then into the dining room of the apartment. Captain Morris opened a door leading off from the dining room, calling out, "Is anyone home?" Upon opening the door Captain Morris found himself in a bedroom where the appellant was lying upon the bed with his eyes shut. The appellant opened his eyes as Captain Morris walked in. Captain Morris asked, "What seems to be the trouble?"

The appellant stated, "There it is." Captain Morris said, "There what is?" The appellant said again, "There it is." Captain Morris again asked "There what is?" Upon looking down towards the foot of the bed Captain Morris then saw an opium smoking layout and a bottle of opium (T.R. 80, 84).

The appellant was then arrested. The appellant was in a groggy condition at that time (T.R. 84). Captain Morris summoned his other two officers and a search was made of the premises.

Two days later Captain Morris called the Federal Bureau of Narcotics and turned the case over to that agency (T.R. 10). The appellant's motion to suppress the evidence was renewed at the beginning of the trial.

At the conclusion of all the evidence and after counsel for both sides had argued, the Court rendered an oral decision (T.R. 195-199).

The foregoing narrative of the facts of this case are in accord with the findings of the trial judge as set out in the oral decision wherein the renewed motion to suppress the evidence was again denied.

QUESTION RAISED

When state police officers in the course of their

normal duties, responding to an anonymous telephone call indicating a man has been poisoned and needs help, enter an apartment through an open door and therein find contraband narcotics in plain sight and seize the same, have the constitutional rights of the owners been violated?

SPECIFICATIONS OF ERROR

The specifications of error upon which the appellant relies are set out on page 3 of the appellant's brief. The first two specifications of error are directed to the Court's overruling of the defendant's motion to suppress the evidence both before and during the trial. In the third specification of error the appellant claims the Court erred in overruling his motion for a new trial.

ARGUMENT ON SPECIFICATIONS OF ERROR No. 1 and 2

SUMMARY

The police officers were responding to a grave emergency. It had been reported to them that a man was dying. They entered the Appellant's apartment through an open door calling out "Is anyone home?" The police officers had no suspicion that they would find a violation of the Federal Narcotic Laws. The discovery and seizure of the contraband was purely

by accident because of its being in plain sight of the officers. Two days later the case was turned over to the Federal authorities on a silver platter. The search was not made by Federal officers.

ARGUMENT

The appellant in his brief argues under Specifications of Error 1 and 2 that the search and seizure made by the Seattle Police under supervision of Captain Morris was unreasonable. In support of the Appellant's argument several cases are cited where Federal agents, or local police cooperating with Federal agents, have made an illegal search and seizure based upon bits of information which led the officers to believe that a crime had been committed. In each of the cases cited by the Appellant the officers entered the premises for the purpose of making a search.

In the case at hand the Seattle Police officers entered the Appellant's apartment on a mission of mercy in answer to what amounts to a call for help, a grave emergency. The police officers had no idea any Federal crime was being committed within the premises at the time they entered. The police officers entered an open door calling out many times "Is anyone home?" The Appellant calls this a raid. After the police officers discovered the Appellant,

in what is described in the evidence as being in a groggy condition, the contraband narcotics were discovered, not by search, but by virtue of the fact that the opium layout and some of the opium was lying in plain sight by the Appellant on the bed. Thereafter the Appellant was arrested and an additional search was made. Two days later the City police officers virtually turned the case over to the Federal officers on a silver platter. There is not one word of evidence to indicate that the Federal officers had any knowledge of the Appellant or his unlawful activities prior to this time.

The Appellee contends that the search and seizure were not made by Federal officers, therefore the provisions of the Constitution are not applicable.

As the Supreme Court of the United States stated in *Lustig v. United States*, 338 U.S., 74, 78-79, "It is not a search by a Federal official if evidence secured by State authorities is turned over to the Federal authorities on a silver platter." The evidence clearly shows, and the trial judge so found, that this is exactly what happened in the case at hand. (T.R. 195-199).

The Appellant seeks support in the case of *United States v. Clark*, D.C. Mo. 1939, 25 Fed. Supp. 139. In that case the officers were specifically looking for

narcotics. In the case at hand no such facts exist, therefore the Clark case is of no help.

The Appellant cites *Kroska v. United States*, 51 Fed. (2d) 330. In that case the officers saw a keg in the rear compartment of the defendant's car which was in the garage, the officers further noticing a strong smell of moonshine. There, again, the officers were looking for contraband. No such facts exist in the case at hand. Therefore, the Kroska case is of no support to the Appellant.

The Appellant cites *Hernandez v. United States*, 17 Fed. (2d) 373. In that case the Federal Narcotic Agents were watching a house in which it was believed narcotics had been sold. There, again, the officers were specifically looking for contraband, which fact distinguishes the Hernandez case from the case at hand.

The Appellant cites *Poldo v. United States*, 55 Fed. (2d) 866. In that case the officers saw the defendant carry a metal disc, such as is used in making the reeding or knurled edge on counterfeit silver dollars. Here, again, the officers were specifically looking for a Federal law violation, which fact distinguishes the Poldo case from the one at hand.

The Appellant cites *United States v. Hirsch*, 57

Fed. (2d) 555. In that case the officers entered a building in which they believed, principally from their sense of smell, that an illicit still was in operation therein. Here, again, the officers were specifically looking for contraband.

The Appellant cites the case of *Johnson v. United States*, 333 U.S., 10. In that case the officers had previous information through an informer that the defendant was smoking opium in her hotel room. The officers entered the defendant's premises for the specific purpose of enforcing the Federal Narcotic Laws. This fact distinguishes the Johnson case from the case at hand.

It is submitted that the Appellant has not cited one case where a search and seizure has been held illegal where the State officers, in the course of their normal duties, have unintentionally discovered the contraband.

The Appellant further argues that the narrative of events as related by the Seattle Police officers is incredible and not worthy of belief. The trial judge had an opportunity not only to hear the witnesses but to observe their manner and demeanor upon the witness stand. The trial judge in his oral decision at the conclusion of all the evidence found that the narrative as told by the police officers was true. Thus,

the Appellant, in his argument, in reality, is asking this court to substitute its judgment as to the credibility to be given the witnesses and to reverse the Findings of Fact made by the trial judge. This is not a cese where it is claimed that there is not sufficient evidence to support the Findings of Fact made by a trial judge. The Findings of Fact made by the trial judge are exactly in accord with the testimony of the Seattle Police Officers, of which there is an abundance.

If the Appellant's apparent theory of this case were followed, police officers would be prohibited from entering private dwellings where there was an indication that someone therein was dying and needed help. Activities and duties such as these are lawful, and it is to be expected that police officers will diligently perform them.

In *McDonald v. United States*, 335 U.S. 451, the opinion uses the following language:

> "This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law. * * * *
>
> "Where as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. * * * "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police."

Under the Appellant's theory of this case, the police officers, upon finding the Appellant in a groggy physical condition with a hot opium pipe beside him, should have turned around and walked out to go find a Commissioner and obtain a search warrant. The fallacies of such reasoning are obvious. If such had been the intention of the framers of the Constitution, it would have been a simple matter for them to have stated that no search and seizure would be lawful unless performed in accordance with a search warrant. However, the framers of the Constitution sought only to protect the citizenry against *unreasonable* searches and seizures.

The case of *Symons v. United States*, decided December 14, 1949, by the Court of Appeals for the Ninth Circuit, is relied upon by the Appellee. In that case the Court sustained the decision of the trial judge in overruling a motion to support the evidence. In that case the State Officers were following the trail of some marihuana. Upon demanding entrance to the defendant's home, the defendant refused to allow them to enter. One of the officers threw a flower pot through the window, by which means he and other officers entered the house. The ensuing search produced a large quantity of marihuana. Within approximately an hour the State Officers de-

cided to turn the case over to the Federal agents. The following is quoted from the decision:

> "Appellant contends that the local police were acting as "agents" for the Federal Government but the evidence wholly fails to support this allegation and the court so found. These state officers were fully aware that possession of marihuana constitutes an offense against the laws of the State of California amounting to a felony. For us to say that under the circumstances here shown the federal officers had no lawful right to accept this marihuana from the state officers and that by accepting it they somehow violated the 'constitutional rights' of a willful law violator, would delight those who profess to see nothing but evil and sinister design in efforts of law enforcing agencies to protect organized society against the criminal activities of men engaged in a vicious and degrading traffic. As respects this phase of the case the record provides no indication or evidence whatever that the local police had decided (to employ their vernacular) to 'take it federal' until *after* the arrest was made by them, and *after* the completion of their search and seizure and careful marking of the seized marihuana, for identification."

The case at hand is even stronger in favor of the Government than the Symons case. In the case at hand the officers entered the premises through an open door on an emergency, a mission of mercy, with no thought or suspicion that they might discover a violation of Federal laws therein. The trial judge committed no errors in overruling the Appellant's motions to suppress.

ARGUMENT ON SPECIFICATION OF ERROR 3

SUMMARY

Refusal of the District Court to grant a new trial is not assignable as error on appeal.

ARGUMENT

The Appellant's third specification of error is, "The District Court erred in overruling the defendant's motion timely made for a new trial." It has been well settled in this court as well as in the United States Supreme Court that such an error is not proper grounds for an appeal.

In *Wheeler v. United States*, 159 U.S. 523, 40 L.Ed. 244, the opinion states:

> "Another contention is that the Court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. *Moore v. United States*, 150 U.S. 57; *Holder v. United States*, 150 U.S. 91; *Blitz v. United States*, 153 U.S. 308."

For other cases with like holding, see *Klune v. United States*, 159 U.S. 590, 40 L.Ed. 269, and *Lueders v. United States*, 210 Fed. 419 (9 Cir.).

CONCLUSION

The City police officers acting entirely upon their own in the performance of their normal functions in response to an emergency call, having unintentionally discovered the contraband narcotics, and two days later having turned the evidence over to the Federal agents, who prior to that time had no knowledge of the case, did, in fact, hand the case to the Federal authorities upon a silver platter, and any search and seizure made by the City police officers was not made by Federal officials.

Respectfully submitted,

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